COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
DOCKET NUMBER: 2014-SC-000526

MARSHALL PARKER **APPELLANT**

VS.

COURT OF APPEALS
DOCKET NUMBER: 2013-CA-001978-WC
WCB NUMBER: 09-99663

WEBSTER COUNTY COAL, LLC (DOTIKI MINE),
HON. STEVEN G. BOLTON AND
WORKERS COMPENSATION BOARD **APPELLEES**

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APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing was sent by overnight mail to the Clerk of Supreme Court of Kentucky, Capital Bldg., Room 235, 700 Capital Ave., Frankfort, KY 40601 and copies were served by Priority US mail, to Kentucky Court of Appeals, Sam Givens, Clerk, 360 Democrat Drive, Frankfort, KY 40601- 9229, Hon. Steven G. Bolton, ALJ, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; Workers' Compensation Board, Office of Workers' Claims, Prevention Park 657 Chamberlin Avenue, Frankfort, KY, 40601, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601-3449; and Stanley S. Dawson, Esq., Fulton & Devlin, LLC, 1315 Herr Lane, Suite 210, Louisville, KY 40222, this 24th day of November 2014.

Respectfully submitted,

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INTRODUCTION

Comes now the Appellant and appeals to the Supreme Court of Kentucky from the portion of the Kentucky Court of Appeals decision dated August 8, 2014, holding that the social security offset provision, KRS 342.730(4), is constitutional. Appellant will show that the social security offset provision violates due process by invalidating the implied consent aspect of the Kentucky Workers Compensation scheme and that the provision violates the equal protection provisions of the United States and Kentucky Constitutions because the statute is not rationally related to a legitimate government objective.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant desires oral argument because this Court's holding will potentially impact every worker and employer in the State.

STATEMENT OF POINTS AND AUTHORITIES

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STATEMENT OF THE CASE

Marshall Parker was a coal miner at the Dotiki Mine and was injured on the job September 9, 2008 while working underground on a conveyor belt. At the time of his injury, he was almost 69 years old and was working 70 to 80 hours per week. Mr. Parker worked so much even after receiving social security retirement income because he was supporting two adult, disabled children. His daughter had been born with a birth defect and had never been able to function physically and his son was in a car accident which caused his paralysis. Mr. Parker testified that he needed the extra income to support his entire family and to pay all the co-pays and deductibles that came with the extensive medical treatment of his children.

In the injury, he injured his knee and back and filed a workers compensation claim. The employer voluntarily paid total temporary disability benefits for two years and paid medical benefits for the knee portion of his claim. The employer contested relatedness on the back claiming that it was due to a prior active condition, although plaintiff had been working seventy to eighty hours a week on a regular basis prior to September 9, 2008, according to the employer's records.

The Administrative Law Judge found both the knee and back injuries to be related to the September 9, 2008 injury and awarded medical benefits plus disability benefits. The award went on to note that due to Mr. Parker's eligibility for Social Security Retirement Income, his disability benefits would be limited by

statute to a period of two years and had already been paid by the employer. As a result, the administrative law judge found that Mr. Parker was entitled to no more disability benefits pursuant to KRS 342.730.

Plaintiff has appealed the matter at each stage below.

ARGUMENT

I. INTRODUCTION

A portion of the Kentucky workers compensation scheme, KRS 342.730(4), requires that workers compensation recipients have their benefits eliminated once they reach the age requirement for Social Security Retirement Income. It does allow for a minimum time period of recovery of two years. Without this provision, the statutory scheme calls for an injured worker to receive benefits during the time he is totally temporarily disabled and for 425 or 520 weeks of permanent partial disability compensation or a lifetime of permanent total disability compensation. KRS 342.730. Mr. Parker, Appellant, was one month from turning 69 years old at the time of his injury. He was eligible for and receiving social security retirement income and still working at Appellee's mines.

Though he was awarded temporary total disability for a period of 2 years and permanent partial disability for an additional 425 weeks, the permanent partial disability benefits were offset by his social security retirement benefits. Mr. Parker seeks to demonstrate that the social security offset provision in KRS 342.730(4) violates the equal protection rights under the United States Constitution and the Kentucky Constitution.

II. DUE PROCESS

A. Historical Background

Workers compensation provides certain medical and disability benefits to

injured workers but grants immunity from tort suits to the employers and their insurance companies. This grant of immunity to the employers was not something that was completely within the power of state legislatures to enact. They could not simply abolish the tort rights of the employees but instead had to also provide for an adequate substitute remedy. *New York Central Ry. Co. v. White*, 243 U.S. 188 (1917). This is because the due process clause guarantees citizens "those privileges long recognized at common law to be essential to the orderly pursuit of happiness." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). These privileges include the right to redress upon personal harm. *Id.* at 675.

Because workers compensation laws have been in place for so long, it is easy to forget that there are limits on what can be taken away. It is clear that the legislature can't take away the remedy entirely and that an adequate substitute must remain. The Supreme Court has struck down legislation that merely limited civil actions when it determined that the remaining remedy was insufficient. *Truax v. Corrigan*, 257 U.S. 312 (1921). In *Truax v. Corrigan*, the Court was presented with an Arizona statute that forbade injunctions in the case of employees picketing and libeling a business with banners and handbills. The court determined that it was not enough that the business owner could file suit for damages, just the loss of injunctive relief was too much of an intrusion to still pass constitutional muster. *Id.*

In *Truax*, the Court said, "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right

and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve..." *Id.* at 329-330. The Supreme Court did not give a bright line test in this case or any other but it is absolutely clear that there is a limit to what a legislature can do when restricting a person's common law rights.

B. **Jural Rights**

The case for limiting the power of the legislature may be even stronger in Kentucky because our Constitution contains sections that have been interpreted as restricting the legislature's power to limit recovery for personal injury or death. And as such, the workers compensation statutes are only constitutional to the extent that it is fair to deem these rights waived in return for the benefit received. *McLain v. Dana Corp.*, 16 S.W.3d 320 (Ky. App. 1999), *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975).

In *McLain*, the court was addressing the validity of the workers compensation scheme in Kentucky and specifically, the implied consent provision. The court noted that without this provision, the jural rights doctrine would be implicated. *Id.* at 323 - 324. The court went on to note that the implied consent provision makes the act voluntary and that such arrangements have been upheld by Kentucky and other states highest courts. But then the court addresses what is necessary for the implied consent provision to be constitutionally permissible and refers to the Kentucky Supreme Court decision of *Fann v. McGuffey*. The court quotes the *Fann* decision:

"At the outset, the implied-consent theory must be

> recognized for what it is. As in the instance of contracts implied in law vis-a-vis contracts implied in fact, it necessarily stands on fiction rather than fact. But it is not thereby degraded or denigrated, because the venerated fictions of the law have been deliberately created to achieve what is right. The law simply declares that as done which ought to have been done. If implied-consent laws (or, for that matter, any other laws) had to depend on actual notice they could not exist. It seems to us, therefore, that the proper test of such a law is whether under all the circumstances, considering the public purpose sought to be accomplished and the nature and extent of detriment to the individual, it is reasonable for it to presume consent where none exists in fact. The exchange of rights must be reasonable so that it is reasonable to presume consent on behalf of Kentucky's workers.

The U.S. Supreme Court's requirement of a reasonable substitute for common law rights legislatively curtailed and the Kentucky Supreme Court's requirement of a reasonable presumption of consent are problematic when applied to the social security offset in KRS 342.730. It reduces the benefits no almost nil for the injured 65 year old worker and it does not benefit from the *in futuro* rationale of the original act.

Workers, such as Mr. Parker, who are to be subject to the workers compensation offset provision in KRS 342.730(4) receive only two years of disability benefits and medical coverage. And the medical coverage is of far less value now that every worker is presumed to be covered by insurance, or as is the case here, covered by Medicare. So the tradeoff for tort rights has gone from disability benefits and medical coverage to simply two years of disability coverage. That is a trade many would consider foolish but that is still not the worst of it.

A big part of the reason the original trade off was fair, tort rights for workers compensation benefits, was that the trade was in the nature of insurance. Since an individual's chance of ever needing or benefiting from his tort rights was small, trading those rights for the much smaller but more likely benefit of workers compensation made sense. Far fewer workers would be hurt in a tortious work injury than in fault free injury. So under the tort system, few workers would be compensated fully for tortious injuries and many would receive nothing in innocent injuries. But under the workers compensation system, each day you come to work and impliedly accept the trade off, you agree to forego tort rights you don't know if you will need and you are assured of getting some benefits for any work injury.

The Social Security offset does not have this same virtue. Based upon the assumptions in the implied consent doctrine, each day Mr. Parker came to work, he was agreeing to give up his tort rights but he knew in exchange he received almost nothing he did not already have.

For those subject to the social security offset, the benefit is too small and the detriment is too certain to pass constitutional muster; the tradeoff is not reasonable and the implied consent is invalid.

III. EQUAL PROTECTION

Equal protection arguments are asserted in vain so frequently that the words have lost their meaning for some. Except in the context of race, some desensitization may have developed. But Kentucky courts and the United States

Supreme Court have been clear about the importance of the principles involved. In *Vision Mining Inc. v. Jesse Gardner,* 364 S.W.3d 455 (Ky. 2011), this Court stated:

> In sum, the goal of the 14th Amendment to the United States Constitution, as well as Sections 1,2, and 3 of the Kentucky Constitution, is to "keep[ ] governmental decision makers from treating differently persons who are in all relevant respects alike." [22] *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112, S.Ct. 2326, 120 L.Ed.2d 1 (1992).

In *Tabler v. Wallace,* 704 S.W.2d 179 (Ky. 1985), the Court summarized the history that brought about the Kentucky equal protection provisions. It was noted that the Debates of the Constitutional Convention revealed that the main motivating factor in drafting and passing the Kentucky Constitution was to restrict the power of the legislature, particularly concerning special legislation. In that same tradition, Mr. Parker seeks to have the Social Security offset provision invalidated as an arbitrary exercise of legislative power against a limited class.

A. **Class and Scrutiny Level**

The class may be defined as those injured workers who receive Social Security Retirement Income but could be defined as injured workers over the age of 65. All courts that have addressed the issue have found that the classification is properly considered to be one of age or of receipt of workers compensation benefits and therefore subject to the lowest level scrutiny. *Steven Lee*

Enterprises v. Varney, Ky., 36 S.W.3d 391, 395 (2000), *Mass. Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

In *Murgia,* the issue was mandatory retirement of state police officers at the age of 50. Since public safety was at the heart of the statute and the age was below "old," the court found **strict scrutiny** was not warranted. The Court did not even address whether intermediate scrutiny would be appropriate. *Id* at 313. But the Court did recognize that the aged were not "wholly free of discrimination." *Id.* The *Murgia* language is not inconsistent with treating age as a quasi-suspect class entitled to intermediate scrutiny except for the particular circumstances of that case.

This Court has addressed the requirements for intermediate scrutiny. *D.F. v. Codell,* 127 S.W.3d 571 (Ky. 2003) stated that intermediate scrutiny should be used when the class, such as women, has suffered intense and irrational discrimination. *Id* at 375. *Murgia* acknowledged a history of discrimination against the aged but the case for discrimination was put in much stronger terms by Congress. 29 USC 621 states:

> **§ 621. Congressional statement of findings and purpose**
>
> (a) The Congress hereby finds and declares that-
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of

older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Keeping in mind that Appellant is asking the Court overturn recent precedent, he will not also argue much further to have this Court be the first in the country to apply intermediate scrutiny to an age classification. Suffice to say that the time may be coming.

B. **Rational Basis**

The lowest scrutiny is rational basis and requires a legitimate governmental purpose for which the statute is rationally related. *Chapman v. Gorman, Ky.*, 839 S.W.2d 232, 239 (Ky. 1992). Since the statute clearly discriminates against those 65 and older, the analysis must determine if there is a good reason for the discrimination and if the reason or objective is being sought in a rational way.

The Kentucky Supreme Court in *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (Ky. 2002), and nearly every other state Supreme Court that has looked at the issue of constitutional validity of social security offset provisions has done so with the same analysis. That analysis being whether the provision could be

justified based upon a reduction of costs while avoiding duplication of wage loss benefits, some striking the provision such as Utah, West Virginia, and Arkansas, some upholding the provision, Kentucky, Tennessee, and Washington. *Id*, *State ex rel. Boan v. Richardson*, 482 S.E.2d 162 (W.Va. 1996), *Golden v. Westark Community College*, 969 S.W.2d 154 (Ark. 1998), *Merrill v. Utah Labor Commission*, 223 P.3d 1089 (Utah 2009), *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856 (Tn. 1996), and *Harris v. State Department of Labor and Industries*, 843 P.2d 1056 (Wa. 1993). The argument is that workers compensation disability benefits are designed to replace lost income occurring when the worker becomes injured but that lost income is no longer felt once the injured worker reaches retirement age and receives social security retirement income. *Id.* The reason that the twin objectives appear in the analysis is because cost savings alone would not justify the legislative action. If cost saving were justification enough, then the benefits could simply be wiped away, achieving much greater cost savings. *Plyler v. Doe,* 457 US 202, 227 (1982), and *Memorial Hospital v. Maricopa County,* 415 US 250, 263 (1974).

The argument has been that the workers compensation system needed a cost savings to solidify its finances which would thereby benefit the entire economy. The argument's weak spot is the cost of this benefit is borne not by all those who enjoy the benefits of the greater economy but by a limited and somewhat suspect class of citizens, the elderly. What makes it fair for this class to be singled out? The answer seems to be that the Courts upholding social security offsets portray social security retirement income benefits and workers

compensation disability benefits as something of a handout. The Kentucky Supreme Court in *McDowell* referred to the benefits as "welfare benefits". *Id* at 77. And by the context it is clear the opinion does not mean "welfare" as in the sense of something that is for the good of a person but rather a benefit that is distinguishable from something that is earned, like wages.

No other opinion has stated so plainly what seems to be implied by these social security offset provisions, that seniors shouldn't be receiving two welfare benefits at the same time or that they don't need to be receiving these two benefits at the same time. Without that rationale some justification as to why this money is not rightfully received, the offset provision would simply be taking the money from a few peoples' pockets and putting it into the pockets of others.

There cost reduction and elimination of duplicate argument fails to provide the needed justification for two reasons. The social security retirement income benefits are not the same as workers compensation benefits and in any event, both benefits are earned. A review of the decisions cited approvingly by the *McDowell* opinion demonstrates that there is very little support remaining for this analysis. Though the decision cites Larson's on Workers' Compensation for the proposition that "the constitutionality of these provisions has been largely upheld against equal protection challenges." Larson's on Workers' Compensation Law § 157.03. That is no longer true. The more recent decisions have recognized that social security retirement income benefits are paid for at least in part by the employee wage deductions and that social security retirement income is not simply a wage loss benefit. This is particularly true since the

passage of 42 USC 403 (f)(8)(E), the "Senior Citizens Freedom to Work Act of 2000". This law eliminated income restrictions on social security retirement income recipients. After the passage of this statute, people could receive their social security retirement benefits and work as much as they liked.

In reviewing the authorities from other states, we will start with those decisions cited by the *McDowell* opinion. Larson addresses the issue generally beginning at § 157.03 of his treatise. The analysis there seems to be that in an ordered system of government, a worker should not be eligible for multiple wage replacement benefits when he is only suffering the loss of one wage. First of all, if the system were truly orderly, a worker eligible for only benefit would only pay for one benefit. That is certainly not the case for Mr. Parker and everyone like him. He has paid into the social security program for decades and continued to do so right up to the age of 69. He also paid for the workers compensation benefits by waiving his constitutional right to personal injury compensation. Additionally, Mr. Parker's circumstances in this case are a perfect example of why social security retirement income cannot be considered wage loss replacement or welfare benefits. Mr. Parker had passed the age of 65 and was eligible for and receiving full social security retirement income but continued to work to keep his household income up. His family circumstances made it a necessity which may be the case for others but undoubtedly, some over 65 continue to work simply by choice.

The *McDowell* opinion then cites the Kansas case, *Injured Workers of Kansas v. Franklin*, 942 P.2d 591 (Kan. 1997). The opinion gives a summary of

the holding as "benefits offset by social security 'retirement benefits' and private pension plan retirement benefits." *McDowell* at 75. The Kansas opinion quoted Larson's "three benefits but one loss argument" and determined that the offset statute was constitutional. However, a more recent case from the Kansas Court of Appeals has determined that the Freedom to Work Act, allowing social security recipients to work without limit, has changed the constitutional analysis. *Hoesli v. Triplet*, 109, 448 (Kan. App. 2014) (unpublished opinion) (copy attached). The *Hoseli* Court based its reasoning on a Kansas Supreme Court decision, *Dickens v. Pizza Company*, 974 P.2d 601 (Kan. 1999). In the *Dickens* opinion, the Kansas Supreme Court limited its prior decisions upholding the constitutionality of the social security offset provisions. The *Dickens* court held that the provision would not be constitutionally valid if applied to persons who had continued working after retirement and then were injured. The reasoning was that social security retirement benefits were obviously not wage loss replacement benefits but rather income supplement benefits. *Dickens* at 1071. The *Hoseli* court referred to decisions from Montana and Utah for support of the proposition that social security retirement is not duplicative of workers compensation wage loss benefits. *Id.* at 4-5. The opinion refers to the various state supreme court cases cited by the Utah Supreme Court and its decision of *Merril v. Utah Labor Commission*, 223 P.3d 1089 (Utah 2009). The *Hoseli* court notes that the Utah court did find some cases to the contrary but that they all pre-dated the passage of the Senior Citizens Freedom to Work Act. *Id.* at 5. Based upon the positive authorities found and based upon the lead of its own

supreme court, the *Hoseli* opinion holds that the social security set off is not valid since it does not prevent any duplication of benefits. *Id.*

The *McDowell* opinion then cites cases from Maine and Massachusetts. Both of these offset provisions are different than Kentucky's offset provisions of *Berry v. HR Beal and Sons*, 649 A.2d 1101 (Me. 1994) and *The Case of Tobin*, 675 N.E.2d 781 (Mass. 1997). The summary of the case given was "benefits reduced by 50% of an amount of social security 'retirement benefits' received." This summary demonstrates a departure from the duplication of benefits rationale. Only eliminating fifty percent of the social security retirement benefits at least recognizes that the employee pays for half of the benefits by deductions from his pay. So the Maine offset provision keeps the earned benefits intact. *Tobin* at 781.

The Massachusetts offset is different also in that it tries to apply the offset only when there actually is no further wage loss from employment. If the employee continues to work or shows they would have continued to work but for the injury, the offset does not apply.

McDowell then cites the Tennessee case of *Vogel v. Wells Fargo Services*, 937 S.W.2d 856 (Tenn. 1996) and the case of *Harris v. State Department of Labor and Industry*, 843 P.2d 1056 (Wash. 1993). These cases do affirm the constitutionality of offset statutes similar to Kentucky's but are both decided prior to the Senior Citizens Freedom to Work Act which makes their analysis outdated. As noted by the *Hoseli* Court, there has been almost no decision upholding an offset provision since the social security law was changed. Kentucky is the only

state in which the Supreme Court has upheld a complete social security offset since 2000.

A review of the various state decisions on the constitutionality of social security offsets of workers compensation benefits shows that the outcome of the analysis is almost perfectly dependent upon the label applied to the workers compensation benefits and the label applied to the social security retirement benefits. If they are welfare benefits, obviously welfare benefits should not be duplicated. If they are both benefits designed to properly replace wage loss experienced by the beneficiary, then there is an argument that eliminating duplication advances a legitimate objective, except for the fact that the worker has earned both benefits.

But if the social security retirement benefits are considered to be pension type benefits, something that the employee has earned and has a right to expect to receive, then there is no duplication with the workers compensation benefits. This court may hold against Mr. Parker but will have to explicitly or impliedly find that his workers compensation benefits and his social security benefits are welfare benefits or at the very least that they are not something that he has earned. He would urge you not to take such a position.

IV. EFFECT OF THE COURT'S RULING

Appellant realizes that this Court must consider the effect of its ruling beyond just Mr. Parker. The fiscal health of the workers compensation system is certainly not a trivial matter but do we have any idea what costs are actually saved

by the social security offset provision? And if the law is upheld can we predict what will happen when employees of advancing years begin to understand the ramifications of their implied consent? Will many of them decide to file notices electing to opt out of the workers compensation system? If so, then the unintended consequence of this law may be that it creates far more of a burden for the industry than it attempted to reduce.

CONCLUSION

Mr. Parker respectfully requests the Court to find that KRS 342.730(4) is unconstitutional on due process and equal protection grounds because it offsets benefits that were earned by him, bargained for in his implied consent waiver, and are not welfare benefits. In the alternative, Mr. Parker would ask that the Court at least find that the offset provision is unconstitutional as applied to him since at the time of his injury, he was already receiving social security retirement income and because his benefits are only permanent partial disability benefits, not permanent total disability benefits.

Respectfully submitted,

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